SAVONOSKI, INC.

IBLA 83-951 Decided April 30, 1984

Appeal from a determination by the Bureau of Indian Affairs to issue a certificate of ineligibility to Savonoski, Inc., for status as a Native group. AA-11139.

Affirmed.

1. Alaska Native Claims Settlement Act: Conveyances: Native Groups

A determination by the Bureau of Indian Affairs to deny a Native corporation status as a Native group because the members of the corporation do not compose more than one family or household as required by 43 CFR 2653.6(a)(5) will be affirmed on appeal where the facts show that the seven Native members are a father, a mother, and five children, and that although one of the children was an adult on the critical census date and was head of a household in another area, the living situation at the group locality was that of a single family or household with the father as the head of that family or household.

APPEARANCES: Tred Eyerly, Esq., Alaska Legal Services Corporation, Anchorage, Alaska, for Savonoski, Inc.; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for the Bureau of Indian Affairs; M. Francis Neville, Esq., Assistant Attorney General, for the State of Alaska, intervenor.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Savonoski, Inc., has appealed from a June 20, 1983, determination by the Area Director, Bureau of Indian Affairs (BIA), to issue a certificate of ineligibility to Savonoski, Inc., for status as a Native group. 1/ The basis for the issuance of the certificate was stated as follows:

> Extensive field investigation by BIA personnel determined that the only residents of Savonoski on April 1, 1970, who are

1/ 43 CFR 2653.6(a)(7) provides that "[a]ppeals concerning the eligibility of a Native group may be made to the Board of Land Appeals in accordance with 43 CFR Part 4, Subpart E."

enrolled members of Savonoski, Incorporated, were the McCarlo family. The McCarlo family were members of a single family and household, and pursuant to 43 CFR 2653.6(a)(5), ineligible for qualification as a Native group.

The Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. §§ 1601-1627 (1976), was enacted to provide a "fair and just settlement of all claims by Natives and Native groups of Alaska, based on aboriginal land claims." 43 U.S.C. § 1601(a). Pursuant to 43 U.S.C. § 1613(h)(2), the Secretary of the Interior is authorized to "withdraw and convey to a Native group that does not qualify as a Native village, if it incorporates under the laws of Alaska, title to the surface estate in not more than 23,040 acres surrounding the Native group's locality." Such a conveyance would be made from "2 million acres of unreserved and unappropriated public lands located outside the areas withdrawn by sections 1610 and 1615" of ANCSA. 43 U.S.C. § 1613(h).

"Native group" is defined in 43 U.S.C. § 1602(d) (1976) as "any tribe, band, clan, village, community, or village association of Natives in Alaska composed of less than twenty-five Natives, who comprise a majority of the residents of the locality." A "Native group" is distinguished from a "Native village" on the basis of numbers of Natives. A "Native village" is composed of 25 or more Natives. 43 U.S.C. § 1602(c) (1976). 2/

The Secretary promulgated regulations at 43 CFR Subpart 2653, regarding, inter alia, the eligibility of Native groups to select lands. The regulations at 43 CFR 2653.0-5(c) provide that a Native group will be "composed of less than 25, but more than 3 Natives." Thus, by regulation the Secretary determined a Native group had to consist of "more than 3 Natives."

2/ Savonoski was among the Native villages listed in 43 U.S.C. § 1610(b)(1) (1976). However, because less than 25 Natives were residents of Savonoski on the 1970 census enumeration date (Apr. 1, 1970), Savonoski did not qualify as a village. Savonoski, Inc., filed its Native group selection application in December 1975. It sought 2,560 acres in secs. 20, 21, 28, and 29, T. 19 S., R. 45 W., Seward meridian. In reliance on the map submitted with the application the Bureau of Land Management platted the selection in R. 44 W., rather than R. 45 W. See Exh. 1 attached to BIA Answer. On Apr. 2, 1984, the State of Alaska filed a motion to intervene as a party in this appeal. It seeks to intervene in support of the BIA decision claiming that it has selected land sought by appellant. On Apr. 9, 1984, counsel for Savonoski filed a response to the motion to intervene opposing the motion "if the proper location of its selection is in T. 19 S., R. 44 W., Seward Meridian." The basis for the opposition is counsel's assertion that the State has no interest in the land as platted in R. 44 W., as the State selection for that land was closed in 1978. Counsel does not attempt to clarify the exact location of the land sought by Savonoski. Given our disposition of this appeal, resolution of the location of the corporation's selection is not important. For the record we grant the motion to intervene.

The record reveals the following facts. The Savonoski group site is a former Alaska Native village. 3/ Residents of old Savonoski relocated to the Savonoski site following the volcanic eruption of Mt. Katmai in 1912. Although a dozen families still lived in the village of Savonoski during the 1950's, most subsequently left so that their children could attend school.

Eight Natives enrolled to Savonoski pursuant to section 5 of ANCSA, 43 U.S.C. § 1604(b) (1976). One of those lived outside Alaska. The other seven are all members of the McCarlo family. They are the father, Mike McCarlo; his wife Katie; and five children, Amel, Nick, Olga, Peter, and Susan.

The McCarlo family, consisting of these seven members, and certain other unenrolled children, lived at the Savonoski site on April 1, 1970. At that time the members lived in a house constructed in approximately 1943. Other structures at the site included a smokehouse, a warehouse, and a steambath. There is evidence in the record that additional houses existed at the site in 1970; however, there is no evidence of their use or occupancy by any of the members enrolled to Savonoski. In 1978 or 1979 the McCarlos moved to South Naknek so their grandson could go to school.

On the critical census date all of the McCarlo's enrolled children were minors, except Peter, who was 30 years old. On appeal counsel for Savonoski, Inc., has submitted the affidavit of Peter McCarlo in which he states:

> 3. For the past twenty years or so I have lived mostly in Savonoski during the winter months. During the summer months, I live and work in South Naknek as a fisherman. This was the pattern I followed in 1970. I lived with my parents during the winter. From June to September I lived in South Naknek and fished for either Alaska Packers Association or Bumble Bee. When I was not fishing I lived in the housing provided at the cannery. I was certainly financially independent during these years, and maintained my own household during the summer months.

(Exh. 1 to Statement of Reasons).

The issue presented in this appeal is whether BIA properly determined that Savonoski, Inc., was composed of only a single family or household on April 1, 1970.

The applicable regulation, 43 CFR 2653.6(a)(5), reads as follows:

> (5) The Native group must have an identifiable physical location. The members of the group must use the group locality as a place where they actually live in permanent structures used

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3/ The group site is located in sec. 10, T. 17 S., R. 46 W., Seward meridian. Since the group site is located within a selection made by Quinuyang, Limited, the village corporation for the village of South Naknek, Savonoski, Inc., sought land in another locality southeast of the group site.

> as dwelling houses. The group must have the character of a separate community, distinguishable from nearby communities, and must be composed of more than a single family or household. Members of a group must have enrolled to the group's locality pursuant to section 5 of the Act, must actually have resided there as of the 1970 census enumeration date, and must have lived there as their principal place of residence since that date. 4/

Counsel for Savonoski, Inc., argues that because Peter McCarlo maintained his own household during the summer when he lived in South Naknek, the McCarlo family was composed of more than a single family or household when they shared a common dwelling at the group site.

Counsel contends that sharing of housing by extended family units is common among Alaska Natives because of the scarcity of housing and associated high living costs. He asserts that this phenomenon mandates a narrow definition of the phrase "single family or household," so as to include only a nuclear family of parents with dependent children, living under one head or manager. Counsel insists that the regulatory construction applied by BIA fails to provide adequate protection for Native groups. He states that if Savonoski, Inc., does not receive land as a Native group, "its members will not receive any land either as individual Natives or as a Native group" (Statement of Reasons at 9). 5/ Counsel further claims that if the BIA decision is allowed to stand the members of Savonoski, Inc., "will have had their aboriginal rights extinguished but will get nothing in return" (Statement of Reasons at 9-10).

In response counsel for BIA asserts that BIA properly applied the applicable regulation and that contrary to the contention of counsel for Savonoski, Inc., the members of Savonoski will not be left landless. In that respect he states:

> In this case, the land the members of the purported group occupied was selected and conveyed to the village corporation of South Naknek. The McCarlo's right to a reconveyance of the land is guaranteed under section 14(c)(1) of ANCSA, 43 U.S.C. 1613(c)(1), and they are not left landless and unprotected by the BIA's finding that they are ineligible as a Native group.

(BIA Answer at 8).

4/ Secretarial Order No. 3083, dated June 17, 1982, and entitled "Eligibility and Land Selections of Native Groups under the Alaska Native Claims Settlement Act," was issued pursuant to the authority of 43 CFR 2650.0-8 which permits the Secretary to waive any nonstatutory regulation implementing ANCSA. In section 4(a) of that order, the Secretary waived "[t]he phrase 'since that date' in 43 CFR § 2653.6(a)(5) (1981)." That phrase is found at the end of the last sentence of the regulation.

5/ Counsel states at page 10 of the statement of reasons, "BIA has effectively disenfranchised the Savonoski Native Group from receiving any benefits under ANCSA."

The facts in this case are nearly identical to those in Neechootaalichaagat Corp., 79 IBLA 301 (1984). In that case five members of the Native corporation claimed a group site (Birch Creek) as their principal place of residence on April 1, 1970. The members consisted of a father and four of his children, one of whom was an adult on the critical date. That person was financially independent of his family on April 1, 1970, and maintained a residence in Nenana during the summer months separate from his father's residence there. BIA issued a certificate of ineligibility stating that the group was not composed of more than one household or family. In upholding the BIA determination, we found that there was no evidence in the record of any separate family or household situation when the father and siblings lived at Birch Creek--the critical locality. The fact that the adult sibling maintained a separate household away from the group site was not controlling.

[1] In a situation such as is involved in this case, Native group eligibility must hinge on the family or household status at the particular group locality. As we stated in Neechootaalichaagat Corp., supra at 305, the broad definition of family, as encompassing extended relationships, should not be imposed to overly restrict such eligibility. No such imposition is being made in this case, however. Here, seven Natives who claim Savonoski as their principal place of residence on April 1, 1970, are all members of an immediate family. They are Mike, the father; Katie, his wife; Mike's son Peter by a previous marriage; and Mike and Katie's children, Amel, Nick, Olga, and Susan.

Although Peter McCarlo maintained a separate household in South Naknek, at the critical group locality on April 1, 1970, he was part of his father's household. All the members shared the same dwelling place. There is no evidence of any separate family or household situation at the group locality. In addition, the mere fact that Peter McCarlo was an adult on April 1, 1970, does not preclude him from being considered, under the circumstances, as part of his father's household or family. See Neechootaalichaagat Corp., supra at 306.

Counsel for Savonoski, Inc., claims that affirmation of the BIA determination will deprive the members of Savonoski, Inc., of their land. Counsel for BIA has correctly pointed out that this is not the case and that the claimed group site must be conveyed by the village corporation, pursuant to section 14(c)(1), 43 U.S.C. § 1613(c)(1) (1976), to the Natives who claimed that area as their primary place of residence on December 18, 1971. Thus, the result of ineligibility for Savonoski, Inc., is not the loss of all ANCSA benefits for the members, rather it is the loss of a claim to 2,560 acres of land in a location other than Savonoski.

Appellant has requested a fact-finding hearing; however, the facts in this case are undisputed. Our resolution of the appeal deals with the application of those facts to our legal interpretation of the controlling regulation. The request is denied.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Bruce R. Harris
Administrative Judge

We concur:

James L. Burski
Administrative Judge

Will A. Irwin
Administrative Judge